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SUPREME COURT OF THE UNITED STATES

October Term, 1952.

No._____

MARIANNE YGLESIAS,

Petitioner,

vs.

GULFSTREAM PARK RACING ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, MARIANNE YGLESIAS, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the United States District Court for the Southern District of Florida, Miami Division, dismissing the complaint of the Petitioner on the ground that said District Court did not have jurisdiction over the subject matter.

A. STATEMENT OF THE MATTER INVOLVED

On March 7, 1952, the District Judge dismissed the complaint of the Petitioner, MARIANNE YGLESIAS, "because of lack of jurisdiction over the subject matter," and the order of dismissal stated therein "this court does not have jurisdiction over the subject matter."

On January 29, 1953, the Court of Appeals for the Fifth Circuit affirmed said order of dismissal of said District Court. Circuit Judge Louie W. Strum wrote the Opinion in the case which was concurred in by Chief Judge Joseph C. Hutcheson, Jr. Circuit Judge Richard T. Rives dissented. The said Opinion is reported at 201 F. 2d 817. Circuit Judge Richard T. Rives gave as his reasons for dissenting those reasons which were stated by him in his dissent in the case of Fannie Mae Whittington vs. Dr. John T. Johnston. This last said case is reported at 201 F. 2d 810 and a copy of the dissent of Judge Rives is attached to this Petition as an appendix.

The matters alleged in said complaint of the Petitioner were in substance as follows, to-wit:

The Petitioner brought suit under 8 U.S.C. 43. The District Court had jurisdiction under 28 U.S.C. 1343. The Respondent, through its agents or employees acting under color of the laws of the State of Florida, did subject, or cause to be subjected, the Petitioner to a deprivation of rights secured by the United States Constitution, by falsely imprisoning the Petitioner, by falsely imprisoning her for an unreasonable period of time without bond, and without the right to confer with counsel, by causing the Petitioner to be subjected to a criminal trial without af-

fording Petitioner a reasonable opportunity to prepare for such trial. The Respondent did conspire with police officers to deprive Petitioner of such constitutional rights, which conspiracy was carried out by said police officers under color of the laws of Florida, by falsely imprisoning the Petitioner. The Respondent did conspire with public officials of Broward County, Florida to deprive Petitioner of such constitutional rights, which conspiracy was carried out by said public officials under color of the laws of Florida by forcing the Petitioner to stand trial on a criminal charge immediately upon arraignment without an opportunity to prepare for such trial. The Petitioner was thrown in jail and held there for a long period of time. While in jail she was denied the right of conferring with counsel, of having a hearing before a Committing Magistrate, and of communicating with any persons to procure a bond. She was forced into a criminal trial as aforesaid without an opportunity to prepare for the same. A jury acquitted her.

Under the allegations of this complaint it is possible to prove that employees or agents of the Respondent were officers under the laws of Florida, and while acting as such employees or agents, under color of the laws of Florida, falsely arrested the Petitioner, and imprisoned her. It is possible also to prove under such allegations that the Respondent conspired with the prosecuting attorney and the trial judge as officials of the State of Florida to force the Petitioner to a trial without preparation or opportunity to talk to counsel and that such conspiracy was carried out by said judge and prosecuting attorney acting under color of the laws of Florida by forcing the Petitioner to trial without such preparation or opportunity to talk to counsel.

B. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

8 U.S.C. 43, the statute under which the Petitioner brought suit in the said District Court, reads as follows, to-wit:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The said District Court had jurisdiction under 28 U.S.C. 1343.

The judgment of the United States Court of Appeals for the Fifth Circuit to be reviewed was entered on January 29, 1953.

The Opinion of the United States Court of Appeals for the Fifth Circuit rendered in connection with said judgment is shown on pages 22-27 of the transcript of record, and the said Opinion is reported at 201 F. 2d 817. As can be seen from said Opinion, Circuit Judge Richard T. Rives dissented therefrom and gave as his reasons for dissenting, his dissenting Opinion in Fannie Mae

Whittington vs. Dr. John D. Johnston, which last mentioned case is reported at 201 F. 2d 810 and which said dissenting Opinion is attached to this Petition as an appendix.

C. QUESTIONS PRESENTED

1. Can a private corporation, through its agents or employees, act under color of state law within the meaning of 8 U.S.C. 43?

2. Is a private corporation liable for damages under 8 U.S.C. 43 where the private corporation, through its agents or employees, conspires and agrees with certain duly constituted state officials to deprive a person of his constitutional rights, and such conspiracy or agreement is actually carried out by the said state officials acting under color of state law?

3. Did the District Court have jurisdiction over the subject matter under the allegations of the complaint?

D. REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals for the Fifth Circuit sought to be reviewed is in conflict with other decisions of other United States Courts of Appeals.

The Opinion of the Court of Appeals for the Fifth Circuit written in connection with its judgment sought to be reviewed is in direct conflict with the Opinion of the Court of Appeals for the Sixth Circuit in the case of **Picking vs. Pennsylvania R. Co., 151 F. 2d 240** and with the Opinions of the Court of Appeals for the Third Circuit in the cases of **Valle vs. Stengel, 176 F. 2d 697** and **McShane vs. Moldovan, 172 F. 2d 1016.**

The Court of Appeals for the Fifth Circuit in its Opinion written in the case sought to be reviewed held that no claim was stated against a private corporation under 8 U.S.C. 43 by an allegation that the private corporation conspired and agreed with certain public officials to deprive a person of certain constitutional rights, which conspiracy was actually carried out by the said public officials acting under color of state law. The Court of Appeals for the Fifth Circuit in the case sought to be reviewed held that 8 U.S.C. 43 created only a substantive right of action. This holding is contrary to the holdings of the Courts of Appeals for the Third and Sixth Circuits. In **Picking vs. Pennsylvania R. Co., 151 F. 2d 240** the Court of Appeals for the Sixth Circuit held that a claim was stated against a corporate defendant under 8 U.S.C. 43 where it was alleged that the corporate defendant adopted a conspiracy to deprive a person of his constitutional rights under color of state law as its own. In **Valle vs. Stengel, 176 F. 2d 697** the Court of Appeals for the Third Circuit held that a claim was stated against a private corporation where it was alleged that civil rights guaranteed to the plaintiffs by the Fourteenth Amendment and protected by the Civil Rights Act were invaded under color of state law. In **McShane vs. Moldovan, 172 F. 2d 1016** the Court of Appeals for the Third Circuit held that a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment and resulting in deprivation of such rights gives rise to an action for damages against the conspirators under 8 U.S.C. 43.

2. The decision of the Court of Appeals for the Fifth Circuit sought to be reviewed is in conflict with applicable decisions of this Court.

The decision of the Court of Appeals for the Fifth Circuit sought to be reviewed affirmed the order of dismissal entered by the District Judge dismissing the complaint for lack of federal jurisdiction. The complaint claimed a right to recover under the Constitution and laws of the United States. This Court has held in **Bell vs Hood, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 733** that it is error to dismiss a complaint for lack of federal jurisdiction where such complaint is drawn so as to claim a right to recover under the Constitution and laws of the United States.

3. This case presents important questions of federal law which have not been, but which should be, settled by this Court.

This Court has never passed upon the important question of the liability of a private corporation under 8 U.S.C. 43, and, as stated by Circuit Judge Richard T. Rives in his dissenting Opinion written in the case of Fannie Mae Whittington vs. Dr. John D. Johnston, which last said case is reported at 201 F. 2d 810, and a copy of which dissent of Judge Rives is attached to this Petition as an appendix (which dissenting Opinion is by reference of Judge Rives made his dissenting Opinion in the case sought to be reviewed),

> "With deference, it seems to me that the decision in the present case constitutes a serious abridgement of the protection provided by Congress to the constitutional rights, privileges and immunities of citizens of the United States, and I, therefore, respectfully dissent."

A supporting brief accompanies this Petition.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, commanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Fifh Circuit may be reversed by this Court; and that your Petitioner may have such other and further relief in the premises as may seem just and proper.

CLAUDE PEPPER
J. M. FLOWERS
HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
1023 du Pont Building
Miami, Florida
Attorneys for Petitioner

APPENDIX

(dissenting opinion of Circuit Judge Rives in Whittington v. Johnston)

The following is a copy of the dissenting opinion of Circuit Judge Richard T. Rives in the case of Fannie Mae Whittington v. Dr. John D. Johnston, et al, decided by the United States Court of Appeals for the Fifth Circuit, case number 14051, on January 29, 1953, which decision is reported at 201 F. 2d 810.

RIVES, Circuit Judge, Dissenting:

I agree that a mere conspiracy, to fall within the ban of 8 U.S.C.A. 47(3), must be "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws", or for some other purpose specified in that section, and which does not include a purpose of denying to a person due process of law. **Collins vs. Hardyman,** 341 U.S. 651, 660. Section 43 on the other hand protects against the deprivation under color of law "of any rights, privileges, or immunities secured by the Constitution and laws," and that, of course, includes the Fourteenth Amendment's provision, "nor shall any State deprive any person of life, liberty, or property, without due process of law".

The complaint charges that the defendants knowingly, willfully and maliciously conspired to have plaintiff wrongfully confined to the Bryce Insane Hospital while she was sane. That is not enough, but the complaint goes further. It charges that, under color of the laws of Ala-

bama, the plaintiff was deprived of her liberty without notice to her and without giving her an opportunity of being heard or defending herself, and that the defendants "willfully, knowingly, wantonly, unlawfully, maliciously, and wrongfully subjected and caused to be subjected the Plaintiff, a citizen of the United States and of the State of Alabama to the deprivation of rights, privileges, and immunities secured to her by the Constitution of the United States (Section 1 of the Fourteenth Amendment)". The complaint seeks recovery under the Fourteenth Amendment and under the Civil Rights Acts, 8 U.S.C.A. 43 and 47(3), and very clearly, it seems to me, brings the case within the jurisdiction of the federal court. **Bell vs. Hood,** 327 U.S. 678,681; **Mitchell vs Greenough,** 100 F. 2d. 184, 185.

It is said, however, that the alleged claim under the Constitution and federal statutes is so patently without merit as to justify the court's dismissal for want of jurisdiction, because it is claimed that 8 U.S.C.A. 43 does not cover acts by a private individual who is not a state officer. That claim cannot stand the test of comparison with the plain words of the statute:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U.S.C.A. 43.

It is significant that all of the language which can be found that tends to restrict the operation of the Civil Rights Acts to officers comes from the cases and not from the statutes. The statute now under consideraion employs the very broadest language to designate the persons covered. Formerly "any person" (see footnote 8, 325 U. S. 99), the expression is now "every person", 8 U.S.C.A. 43.[1] When that expression can be constitutionally applied as written, it would be judicial legislation to change the word "person" to "officer".

This section, as it originally appeared, was Section 1 of "the Act of Apr. 20, 1871, 17 Stat. 13 (the so-called Ku Klux Act)" (325 U. S. at 99). Members of the original Ku Klux Klan to whom this statute was intended to have application were not necessarily officers. Indeed, the federal government was doing its best to exclude them from office.

"Color" of law means "pretense" of law "mere semblance of legal right", "appearance as distinguished from reality". **Screws vs. United States,** 325 U. S. 91; **United States vs. Classic,** 313 U. S. 299; **Williams vs. United States,** 179 F 2d. 656; same case, 341 U. S. 97. In the **Classic** case the defendants were election officials required to count the ballots in a Democratic primary election. The Court said, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." I do not think that there was any intention to say that only officers can act under "color of" law. In this Country a rigid officer class is foreign

[1] It may be noted that the criminal counterpart, 18 U.S.C.A. 242, uses an equally broad expression, "whoever".

to our institutions, the private citizen takes an active part in the affairs of his government and is not uncommonly clothed with authority of law. For example, in many cases in Alabama a private citizen may make arrests, Alabama Code 1940, Title 15, Sec. 158; **Suell vs. Derricott**, 49 So. 495; 4 Am. Jur., Arrests, Sec. 35.

The Alabama statute (Alabama Code 1940, Title 45, Sec. 210) requires that before committing a person to the insane hospital, "the judge of probate shall examine witnesses, at least one of whom shall be a physician." The complaint charges that the defendant Dr. Johnston signed a medical certificate that plaintiff was insane without having made any examination of her, and that by his act in signing such certificate plaintiff was declared insane and deprived of her liberty without a hearing. The complaint thus charges Dr. Johnston with professional or "official" action necessary under Alabama law to the plaintiff's commitment.

Insane persons are committed to the state hospital in Alabama upon the application of "a relative, friend, or other party interested." (Alabama Code 1940, Title 45, Sec. 208.) I think that it sufficiently appears from the complaint that the defendants other than Dr. Johnston come within the classes permitted by Alabama law to institute the proceedings. In the present case, the physician and the friends, relatives and interested persons had authority to institute and prosecute the commitment proceedings. If they exercised that authority vested in them by law with a purpose of depriving the plaintiff of her liberty without due process of law and that result ensued, then, under the statute, 8 U.S.C.A. 43, they are liable to the party injured.

Irrespective, however, of any direct official connection of any of the defendants with the commitment proceedings, it seems to me, under 8 U.S.C.A. 43, that is not essential. That Act makes liable "Every person who, under color of any statute * * * of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws". (Emphasis supplied.) If the defendants caused the state officers to deprive the plaintiff of her liberty without notice to her and without giving her an opportunity of being heard or defending herself, they would be liable under 8 U.S.C.A. 43.

Some meaning must be ascribed to the phrase "or causes to be subjected". As I understand the position of the majority, it is that only an officer can "cause to be subjected", that the "color of office" must clothe the initial causative wrongdoer as distinguished from the one whom he causes to act. It might be claimed that the order of the statutory language tends toward that position.[2] The criminal counterpart of the statute (now 18 U.S.C.A. 242) formerly followed the same order of expression. See 341 U. S. 98 and Footnote 6, 325 U. S. 99.[3] That order is changed in the present Code, 18 U.S.C.A. 242, and the place of the expression "or causes to be subjected" is omitted and supplied only by the general defini-

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2 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected * * *." 8 U.S.C.A. 43.

3 "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected * * *."

tion of a principal to any crime (18 U.S.C.A. 2).[4] Up to the present time, however, it has not been suggested that any change in the meaning of the criminal statute was intended by the revision.

Qui facit per alium facit per se with the added element of willfullness thus aptly describes the rule made applicable to civil rights offenses, as well as to other federal crimes, by 18 U.S.C.A. 2. Ordinarily, to constitute a crime more is required than to amount to a civil wrong; for example, in civil rights offenses the added "willfully". See 325 U. S. at 100. If one may commit the criminal offense through another, it is hard for me to see why he may not commit the civil wrong, especially in view of the alternative provision, "or causes to be subjected".

It is said, however, that the defendants merely instituted the lunacy proceeding and left its conduct to the state officers, that the defendants were entitled to act upon the presumption that the state officers would proceed in accordance with the essential requirements of law. If I could agree that that is all that the complaint charges, I would agree with the conclusion that, "The mere institution of the lunacy proceeding, without more, is too remote in the chain of causation to support an action under 8 U.S.C.A. 43 for 'causing' plaintiff to be deprived of the right to due process." With deference, I submit that the allegations of the complaint charge more; they charge a willful and active participation by the defendants not

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4 "Reference to persons causing or procuring was omitted as unnecessary in view of definition of 'principal' in section 2 of this title." Reviser's note to Sec. 242, Title 18.

Section 2(b) reads: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

merely in instituting the proceedings but in causing the plaintiff to be deprived of her liberty without due process of law. For example, some of the averments of Count 3 are quoted in the margin.[5] Under the averments of the complaint it seems to me that the causual connection is not too remote between the wrongful acts of the defendants and the plaintiff's deprivation of her liberty without due process of law. The defendants willfully[6] caused the state statute to be used in such a manner as to deprive the plaintiff of her liberty without a hearing and without due process of law. The state statute was peculiarly susceptible of such misuse, because it did not give an alleged insane person an absolute right to notice and hearing before being committed, Ala. Code of 1940, Title 45, Sections 208, 210. In **Moses vs. Tarwater,** 58 So. 2d. 757, the Alabama Supreme Court, with one justice dissenting, pretermitted a decision on the constitutionality

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[5] "The Defendants, under color of laws, statutes, customs, or usages of the State of Alabama (Code of Alabama of 1940, Title 15, Section 432, and Title 45, Sections 208, 209, 210) on, to-wit, January 5, 1951, in the Northern Division of the Middle District of Alabama, willfully, knowingly, wantonly, unlawfully, maliciously, and wrongfully subjected and caused to be subjected the Plaintiff, a citizen of the United States and of the State of Alabama to the deprivation of rights, privileges, and immunities secured to her by the Constitution of the United States (Section 1 of the Fourteenth Amendment); that is to say to-wit, that during all of the time herein referred to Plaintiff was sane but, that on, to-wit January 5, 1951, at Troy, Alabama, the Defendants, under color of Code of Alabama, Title 15, Section 432, and Title 45, Sections 208, 209, and 210 did cause Plaintiff to be declared insane, and to be ordered committed to Bryce Insane Hospital, all without notice to her, and without giving her the opportunity of being heard or defending herself and thereby caused her to be arrested and confined in the County jail of Pike County, Alabama, while waiting incorceration in said Bryce Insane Hospital, from January 5 to 9, 1951, inclusive, a period of five days time, and in so doing, did subject and cause to be subjected the Plaintiff to the deprivation of her liberty without due process of law and in violation of her rights, privileges, and immunities secured to her by the Fourteenth Amendment of the Constitution of the United States, all without right or cause * * *."

[6] Willfullness is not required to support a civil action under 8 U.S.C.A. 43, but when averred, as here, it may have a bearing upon casual connection. "The intentional tort, of course, creates liability for consequences which were intended." 38 Am. Jur., Negligence, Sec. 52.

of those sections, and I do not think that such a decision is necessary in this case. It is sufficient to give rise to a cause of action under 8 U.S.C.A. 43, that the acts of the defendants proximately caused state action depriving the plaintiff of her liberty without notice to her and without giving her an opportunity of being heard or defending herself.

Reverting for a moment to the ground of dismissal, the fact that the complaint is subject to the differing interpretations indicated emphasizes the error of the court in basing its order of dismissal on a lack of federal jurisdiction.

While the decided cases are not directly in point, it seems to me that they support the proposition that 8 U.S.C.A. 43 covers acts by one not a state officer but done under color of state law.

In **Collins vs. Hardyman,** 341 U. S. 651, the defendants simply broke up plaintiff's meeting. "There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it" (341 U. S. at 661). The necessary "color" of law, present in this case, was absent in that. Further, the controversy arose under 8 U.S.C.A. 47(3) [341 U. S. at 652] rather than under 8 U.S.C.A. 43, as here.

In **McCartney vs. State of West Virginia,** 156 F 2d. 739, the principal insistence of the plaintiff was that he had a right to sue the State of West Virginia. He made some incidental complaint of lack of due process, but showed no apparent reason for a charge of lack of due process.

In **Williams vs. United States,** 179 F. 2d. 656, affirmed 341 U. S. 97, a private detective who held a special police officer's card issued by the City of Miami, Florida, and had taken an oath and qualified as a special police officer, when showing his badge and accompanied by a regular policeman was held to be acting "under color" of law within the meaning of 18 U.S.C.A. 242, or at least that the jury could properly so find. Significantly the Supreme Court said: "Moreover, this was an investigation conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it" (341 U. S. at 99, 100). Likewise, this Court, in the course of its opinion, said:

> "In the present case the policeman, Ford, although not in uniform, was present in an official capacity as a policeman of the City of Miami, acting under the authority of the City, and giving, under our holding in Crews v. U. S., supra, official color to the investigation. * * *
>
> "Ford was sent to the scene by a superior police officer of the City of Miami. Williams, the appellant, who personally committed most of the assaults and did most of the beating, did so in the presence of this duly constituted, or lawful, officer, who, at least, lent color of law to the occasion." 179 F. 2d. 656, 660.

In **Charlton vs. City of Hialeah,** 188 F. 2d. 421, the complaint failed to name the individual officers of the municipality with whom the defendant Faircloth conspired. The Court held that the civil rights statute, 8 U.S.C.A. 43, did not create a liability on the part of a

municipality or of one who conspired with no individual but with the municipality. It seems to me clearly indicated that a charge that Faircloth conspired with officers of the law would have brought the case within the statute.[7]

In **United States vs. Lynch, et al.**, 94 F. S. 1011, 1013, affirmed by this Court on an appeal by the sheriff and deputy sheriff in **Lynch vs. United States**, 189 F. 2d. 476, District Judge Hooper said in the course of a well considered opinion (94 F. S. at 1013):

> **"Violation of Civil Rights Statute by Private Individuals.** It was insisted by movants that the six named defendants who were not officers of the State could not violate this civil rights statute because it related only to deprivations by a state. True, Section 242 was enacted pursuant to the Fourteenth Amendment and relates to deprivations by states (acting through state officials) and not to acts of private individuals. It does not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code Annotated.
>
> "Thus, in the case of United States v. Trierweiler, D. C., 52 F. Supp. 4, the court pointed out

7 "The complaint fails to name any individuals or officers of the municipality with whom the defendant Faircloth conspired. The reasonable deduction is that, since he conspired with no individual, he must have conspired with the municipality. It is easy to understand how officers exercising the authority delegated to a town or city might, in their individual capacity, be a party to a conspiracy; but a municipal corporation, which is limited by law to the purposes and objects of its creation, namely, the maintaining and exercising of the powers of local government, cannot in its sovereign or municipal capacity be a party to a conspiracy." 188 F. 2d. 421, 422.

that it is immaterial that a private citizen may not have the capacity to commit the offense, if he aids an officer to do so. In other civil rights cases under Section 242 private individuals have been joined as defendants. Williams v. United States, 5 Cir., 179 F. 2d 644; Williams v. United States, 5 Cir., 179 F. 2d 656. The same principle is applied in other cases. Haggerty v. United States, 7 Cir., 5 F. 2d 224 (aiding a prohibition agent); United States v. Orr, D. C., 223 F. 220, 222 (aiding a manufacturer of oleomargarine)."

See also **Valle, et al. vs. Stengel, et al.**, 176 F. 2d. 697; **McShane vs. Moldovan**, 172 F. 2d. 1006; **Picking vs. Pennsylvania Railroad Company**, 151 F. 2d. 240; **Robeson vs. Fanelli**, 94 F. S. 62; **Watkins vs. Oaklawn Jockey Club**, 86 F. S. 1006, affirmed 183 F. 2d. 440.

With deference, it seems to me that the decision in the present case constitutes a serious abridgment of the protection provided by Congress to the constitutional rights, privileges and immunities of citizens of the United States, and I, therefore, respectfully dissent.

Supreme Court of the United States

October Term, 1952

No._____

MARIANNE YGLESIAS,

Petitioner,

vs.

GULFSTREAM PARK RACING ASSOCIATION, INC.,

Respondent.

BRIEF IN SUPPORT OF THE PETITION

I

The Opinion of the United States Court of Appeals, Fifth Circuit, is reported at 201 F. 2d. 817 and is printed on pages 22-27 of the transcript of record. Circuit Judge Rives dissented and gave as his reasons for dissenting those reasons which were stated by him in his dissent in the case of **Fannie Mae Whittington vs. Dr. John D. Johnston** which opinion is reported at 201 F. 2d. 810 and a copy of the said dissent is attached to the Petition as an appendix. The United States District Court for the Southern District of Florida did not deliver a written opinion.

II

JURISDICTION

The jurisdiction of this Court is invoked under U.S.C. Title 28 Section 1254(1). The judgment of the United States Court of Appeals, Fifth Circuit, to be reviewed, was entered on January 29, 1953.

III

STATEMENT OF THE CASE

A Statement of the Case appears under heading "A" of the Petition for Writ of Certiorari. In the interest of brevity that statement is not now repeated but is referred to with the request that it be considered as here incorporated by reference.

IV

QUESTIONS PRESENTED

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the Petition. Again, in the interest of brevity, they are not now repeated, but are referred to with the request that they be considered as here incorporated by reference.

V

THE STATUTE INVOLVED

This suit was instituted under the provisions of 8 U.S.C. 43 which reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

VI

ARGUMENT

Summary of the Argument:

1. An allegation that a private corporation through its agents or employees acting under color of state law deprived the Plaintiff of certain constitutional rights states a claim against the private corporation under 8 U.S.C. 43.

2. An allegation that a private corporation through its agents or employees conspired and agreed with certain duly constituted state officials to deprive a person of certain constitutional rights, and that such conspiracy or agreement was actually carried out by the said state officials acting under color of state law states a claim against the private corporation under 8 U.S.C. 43.

3. A District Court has jurisdiction over the subject matter where a complaint alleges a right to recover under the Constitution and laws of the United States.

I

A private corporation, through its agents or employees, can act under color of state law within the meaning of 8 U.S.C. 43.

It is evident that one of the basic elements of 8 U.S.C. 43 is that the proscribed activities must have been accomplished by action taken under color of state law. It is therefore necessary to first determine the definition of action taken under color of state law, and then determine if such definition can embrace the actions of a private corporation.

The landmark cases which gave virile meaning to the phrase "action taken under color of state law" were **U. S. vs. Classic, 313 U. S. 299, 85 L. Ed. 1368, 61 S. Ct. 1031,** and **Screws vs. U. S., 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031.** In the Classic case the Supreme Court considered the meaning of "under color of" state law as the phrase was contained in Section 20 of the Criminal Code (now 18 U.S.C. 242). The Court stated that (on page 326):

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

In the Screws case the Supreme Court was again presented with the problem of ascertaining the extent of the definition of "under color of" state law. The Court said (on page 111),

> "It is clear that under 'color' of law means under 'pretense' of law."

And, further, in approving the Classic rule the Court said (on page 112),

> "The construction given Section 20 in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important field."

As recently as January 1951 the Supreme Court, in Williams vs. U. S., 341 U. S. 97, 95 L. Ed. 774, 71 S. Ct. 576, has affirmed the Classic rule and quoted it as being the definition of "under color of" law.

Taking, then, the definition of "under color of" law as being "misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law", the question is then presented whether such a definition can be applied to a private individual who is not an official of the state. Both the Classic case and the Screws case involved the criminal prosecution of individuals who were state officials so the question of whether a private individual may so act that his action constitutes action taken under color of law was not presented. However, the decision of the Court of Appeals for the Fifth Circuit in Williams vs. U. S., 179 F. 2d. 656 and the decision of this Court in Williams vs. U. S., 341 U. S. 97, 95 L. Ed. 774, 71 S. Ct. 576 have provided the answer to the problem.

This Court in Williams vs. U. S., 341 U. S. 97, 95 L. Ed. 744, 71 S. Ct. 576 was faced with the problem of determining whether or not Williams, who possessed a policeman's card from the City of Miami and who performed the proscribed acts in the presence of a duly constituted police-

man sent to the scene, was acting under color of law. This Court said (on page 99-100),

> "We think it clear that petitioner was acting "under color" of law within the meaning of Section 20, or at least that the jury could properly so find. We interpreted this phrase of Section 20 in **United States vs. Classic, 313 U. S. 299, 326, 85 L. Ed. 1368, 1383, 61 S. Ct. 1031,** "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." And see **Screws vs. United States,** supra (325 U. S. 107-111, 89 L. Ed. 1505-1508, 65 S. Ct. 1031, 162 ALR 1330). It is common practice, as we noted in **National Labor Relations Board vs. Jones & Laughlin Steel Corp., 331 U. S. 416, 429, 91 L. Ed. 1575, 1583, 67 S. Ct. 1274,** for private guards or detectives to be vested with policeman's powers. We know from the record that that is the policy of Miami, Florida. Moreover, this was an investigation conducted under the aegis of the state as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court to whom we give deference on local law matters, see **Gardner vs. New Jersey, 329 U. S. 565, 583, 91 L. Ed. 504, 520, 67 S. Ct. 467,** was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person."

Thus the rule is evolved that a private individual may act under color of law when his action is under some pretense of authority bestowed upon the individual by the state or when his action is sanctioned in some way by the state. So when an individual makes use of a token of authority given him by the state, such as a policeman's card, he is acting under pretense of state authority and thus under color of law. Also when an individual acts in the presence of and with the approval of a duly constituted state officer the individual acts under the sanction of the state and thus his acts constitute acts done under color of law. This rule has been recognized in **U. S. vs. Lynch, 94 F. Supp. 1011.** The District Court stated (on page 1013),

> "It was insisted by movants that the six named defendants who were not officers of the state could not violate this civil rights statute because it related only to deprivations by a state. True, Section 242 was enacted pursuant to the 14th Amendment and relates to deprivation by states (acting through state officials) and not to acts of private individuals. It does not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code annotated.
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> "Thus, in the case of **United States vs. Trierweiler, D. C., 52 F. Supp. 4,** the court pointed out that it is immaterial that a private citizen may not have the capacity to commit the offense, if he aids an officer to do so. In other civil rights cases under Section 242 private individuals have been joined

as defendants. **Williams vs. United States, 5th Cir. 179 F. 2d. 644, Williams vs. United States, 5th Cir. 179 F. 2d. 656.**"

The District Court further stated (on page 1014),

"While it is true that one must be acting under color of state law in order to violate Section 242, and that ordinarily a private citizen would not act under color of law, it is also true that the presence of state officers and their active participation with other defendants who were not officers would furnish the "color of law" required as to all defendants. This is ruled in **Williams vs. United States, 5th Cir., 179 F. 2d. 656, 658,** involving a conviction under Section 242."

The interpretation of action under color of law as given by the courts in cases involving 18 U.S.C. 242 is applicable also in cases involving 8 U.S.C. 43. As stated in **Picking vs. Pennsylvania R. Co., 151 F. 2d. 240, 248,**

"The operative language of R.S. Section 1979 (8 U.S.C. 43), insofar as is material to the issues presented by this phrase of the instant case, is identical with that of Section 20 of the Criminal Code (now 18 U.S.C. 242). It follows that R.S. Section 1979 must be construed as in pari materia with Section 20. The phrase "under color of any statute . . . " employed in R.S. Section 1979 must be construed as was the phrase "under color of any law" in the Screws case." (parentheses added).

It being therefore established that a private individ-

ual may act under color of law, the next question is whether a private corporation can act so that its action will constitute action taken under color of law. It is settled beyond cavil that the corporation can only act through its officers, agents or employees or, as otherwise stated, the acts of the officers, agents and employees done within the scope of their authority or subsequently ratified by the corporation constitute the acts of the corporation.

In paragraphs IV, V, VI of the complaint (R 2-3) the Petitioner alleges that the Respondent corporation, its agents or employees, acting under color of the law of the State of Florida did subject the Petitioner to a deprivation of her constitutional rights. Under such an allegation the Petitioner could show at the time of trial that the agents of the Respondent possessed a semblance of policeman's powers and pretended to act under such powers, or that the agents acted in the presence of and with the approval of state officials. It is therefore clear that the complaint does state a claim against the Respondent under 8 U.S.C. 43.

II

A private corporation is liable for damages under 8 U.S.C. 43 where the private corporation through its agents or employees conspires and agrees with certain duly constituted state officials to deprive a person of certain constitutional rights and such conspiracy or agreement is actually carried out by the said state officials acting under color of state law.

It is to be noted that 8 U.S.C. 43 not only covers a direct subjection to a deprivation of constitutional

rights but also covers the situation where a person "causes to be subjected" another person to a deprivation of constitutional rights. Thus far in this brief only the direct actions amounting to a deprivation of constitutional rights have been considered. It is now necessary to ascertain the meaning and scope of the phrase "causes to be subjected." As was stated by Judge Rives in his dissenting Opinion in **Whittington vs Johnston,** 201 F. 2d. 810, a copy of which dissenting opinion is attached to the Petition as an Appendix,

> "Some meaning must be ascribed to the phrase 'or causes to be subjected' ".

The meaning of this particular phrase from 8 U.S.C. 43 was discussed in **Watkins vs. Oaklawn Jockey Club, 86 F. Supp. 1006,** affirmed by the Court of Appeals for the 8th Circuit, **183 F. 2d. 440.** In holding that a claim was stated against the defendant, Oaklawn Jockey Club, the District Court said (on page 1016-1017),

> "Section 43 does not in so many words grant a cause of action for a conspiracy to deprive one of his liberty without due process, but it is the opinion of the Court that the language, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights," covers the situation whereby two or more persons conspire or agree to deprive another of a constitutional right and that conspiracy or agreement is actually executed by a party to the agreement acting under color of state law."

Other cases have also held that a claim is stated where the complaint alleges in substance that a corporation or an individual conspired with state officials to deprive the plaintiff of constitutional rights and that such conspiracy was actually carried out by the state officials acting under color of state law.

In **Picking vs. Pennsylvania R. Co., 151 F. 2d. 240,** the corporate defendant moved to dismiss a complaint which sought to state a claim under Section 43. The motion was denied and the Court stated: (on page 249-250),

> "The corporate defendant, the Pennsylvania Railroad Company, however, is not an agency of any state. It is a privately owned railroad corporation. It has moved to dismiss the complaint upon the ground inter alia, that 'There is nothing in the allegations of the Complaint that the Pennsylvania Railroad Company did other than transport as a common carrier the complainants while in the custody of officers of the law.' But, if, as the plaintiffs assert, this defendant "materially and physically participated in" all the alleged unlawful acts of September 15, 1941, it may have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own."

The Court then concluded that the plaintiffs had stated a valid cause of action under the Civil Rights Act against the private corporation.

In **McShane vs. Moldovan, 172 F. 2d. 1016,** the Court of Appeals for the Third Circuit stated that the issue before the Court was:

"Whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment and resulting in deprivation of such rights gives rise to an action for damages against the conspirators under Title 8 U.S.C. Section 43 and 47."

The Court discussed the Classic and Screws cases and then said (on page 1021),

"Since the Screws case, the same question has come before the Circuit Court of Appeals for the Third Circuit in Picking vs. Pennsylvania R. Co., 151 F. 2d. 240, certiorari denied 322 U. S. 776, 68 S. Ct. 38. That case was decided squarely upon the provision of the statute that is before us in this case, 8 U.S.C.A. Section 43. The complaint had asserted that individual defendants who were officers either of the state of Pennsylvania or New York, together with a third party, entered into a conspiracy to deprive plaintiffs of their liberties without due process of law, which was consummated by arresting and imprisoning them in violation of the laws of both Pennsylvania and New York. The district court held that the complaint failed to state a cause of action. On review by the circuit court of appeals, the district court was reversed. In delivering the opinion on appeal, Judge Biggs observed that (151 F. 2d. 248) "It was thought that, absent diversity of citizenship, the federal courts did not have jurisdiction to enjoin action by officers of agencies of a state in violation of the Fourteenth Amendment when

the so-called state action was prohibited by state law." The Court then went on to review Screws vs. United States, supra, and United States vs. Classic, supra, stating that there was no question now as to the sufficiency of the statute to grant a right of civil action, and held that by the provisions of Title 8 U.S.C.A. Section 43, "Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." The Court concluded that the plaintiff had stated a cause of action under the statute in alleging that the state officials had conspired with another to deprive the appellant of her rights under the Fourteenth Amendment, under color of law."

Having made this exhaustive examination of the law, the Court reached the conclusion that (on page 1023),

"The allegations of the complaint in the instant case charged state officers and others with combining in a willful and malicious conspiracy to deprive appellant of the rights secured to her by the Fourteenth Amendment. They charged that these persons, pursuant to such conspiracy, unlawfully arrested and imprisoned appellant and subjected her to a fraudulent criminal trial; and that, in carrying out their conspiracy in this way, they acted under color of the laws of Michigan. It was further asserted in the complaint that, as a result of such conduct carried out under color of the laws of Michigan, appellant was deprived of the constitutional rights secured to her by the Fourteenth

Amendment. In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction."

In **Valle vs. Stengel, 176 F. 2d. 697**, the Court of Appeals for the Third Circuit was again concerned with whether a complaint stated a cause of action as against police officer, Stengel, and as against a corporate defendant. The Court stated (on page 702),

> ". . . since the complaint alleges in effect that he (the police officer) aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own." (parentheses added)

The Court concluded its opinion by stating:

> "The complaint does state a cause of action because it alleges that civil rights guaranteed to the plaintiffs by the Fourteenth Amendment and protected by the Civil Rights Act were invaded by Stengel acting under color of state law. The other individual defendants and the corporate defendant should be kept in the case as parties at this stage of the proceedings. The corporate defendant can act only through its agents, the individual defendants other than Stengel and it is alleged that the other individual defendants caused Stengel's actions of which the plaintiffs complained. It is probable that the status of corporate and individual liability will become much plainer when evidence is offered."

Thus, without a holding to the contrary, all Courts which have dealt with the problem have determined that a claim is stated where the complaint alleges a conspiracy entered into with state officials to deprive the plaintiff of constitutional rights and such conspiracy actually carried out by the state officials acting under color of law, or where it is alleged that a corporated or individual defendant aided and abetted and caused the acts of the state officials which deprived the plaintiff of his constitutional rights, or where it is alleged that a corporate defendant materially and physically participated in the alleged unlawful acts. It is to be noted that it is essential that the conspiracy be actually carried out by one of the conspirators acting under color of law. The mere conspiracy itself does not give rise to an action under Section 43. In applying the language of the decided cases to the allegations of the complaint in the case at bar it is clear that a claim for relief is stated by the allegation that the defendant caused to be subjected the plaintiff to a deprivation of her constitutional rights and by the allegation that the corporate defendant conspired and agreed with state officials to deprive the plaintiff of her constitutional rights and that such conspiracy was actually carried out by the state officials acting under color of law.

No doubt the phrase "causes to be subjected" was intended to cover a situation where a private individual or corporation becomes so powerful that it can corrupt and use the power of the state for its own illegal undertakings.

III

A district court must take jurisdiction over the sub-

ject matter where a complaint claims a right to recover under the constitution and laws of the United States.

In **Bell vs. Hood, 327 U. S. 678, 90 L. Ed. 939, 66 S. Ct. 773,** the plaintiffs sued F.B.I. Agents in the District Court for depriving the Plaintiffs of their liberty without due process of law, and for unreasonable searches and seizures in violation of the Fourth and Fifth Amendments to the United States Constitution. The Defendants were sued as individuals, and the Plaintiffs sought damages. The District Court dismissed the suit for lack of federal jurisdiction, and denied to Plaintiffs the right to amend. The Court of Appeals affirmed the District Court. 150 F 2d. 96. The United States Supreme Court reversed the Court of Appeals. Justice Black wrote the opinion, and, among other things, said:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

This Court in that case further said:

> "Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent "the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . (Constitution or laws) of the United States by his declaration or bill." The Fair vs. Kohler Die & Specialty Co., 228 U. S. 22, 25, 57 L. Ed. 716, 717, 33 S. Ct. 410.

This Court in that case further said:

> "The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution. And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids

> the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

This Court in that case further said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

This case of Bell vs. Hood is very similar to the case at bar. The question involved in that case was whether or not F.B.I. Agents could be sued for damages for violation of the Fourth and Fifth Amendments of the Constitution. It was ultimately determined that these F.B.I. Agents could not be sued. This determination, however, was one upon the merits, and not one upon a jurisdictional question. The United States Supreme Court reversed the District Court and the Court of Appeals for determining this question as a matter of jurisdiction, rather than upon the merits. There is no question in the case at bar, but what the claim of the Appellant arises under the Constitution and laws of the United States, and this alone gives the Court jurisdiction over the subject matter, regardless of whether or not the complaint states a claim.

The complaint in the case at bar so clearly states a substantial and material claim arising under the Federal laws and Constitution, that no question of doubt can arise as to the jurisdiction of the District Court over the subject matter.

CONCLUSION

The Petitioner has shown that a private corporation can act directly under color of state law and is thus liable under 8 U.S.C. 43 when such acts deprive a person of constitutional rights. The Petitioner has shown a private corporation is liable under 8 U.S.C. 43 when it conspires with public officials to deprive a person of constitutional rights and such conspiracy is actually carried out by public officials acting under color of law. Petitioner has shown that by the holdings of this Court the District Court had jurisdiction over the subject matter of the complaint. The Petitioner has shown that the complaint contained all the allegations necessary to establish a claim under 8 U.S.C. 43. The Petitioner respectfully submits that the judgment of the United States Court of Appeals for the Fifth Circuit should be reviewed and reversed by this Court.

Respectfully submitted,

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